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AHMAD IKHWAN AHMAD FAUZI v. MOHD FAHIMI ENDUT (FATHER AND NEXT OF KIN OF AHMAD SAFWAN HANIM MOHD FAHIMI (DECEASED)) & ORS AND ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
MARY LIM FCJ
AB KARIM AB JALIL FCJ
[CIVIL APPEAL NOS: 01(f)-5-02-2023(T) & 01(f)-6-02-2023(T)]
29 MARCH 2024

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Abstract – *Schools of any arrangement are for learning and schooling years are important formative years where personalities are formed and traits are enhanced. It is reasonable and fair to expect that these places of learning are safe and conducive. In the case of residential schools, the responsibility would obviously be even wider and more extensive. Whilst within their premises and the compound of the premises of the school, those who are responsible for the running and managing of a school are responsible for the students' safety, welfare and well-being.*

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TORT: *Assault and battery – Claim – School bullying – Action against students, school authorities and Government of Malaysia – Student/claimant assaulted by other students – Claimant sustained injuries on face and body and lost hearing in right ear – Whether assault and battery established – Whether claims supported by evidence*

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TORT: *Liability – Vicarious liability – School bullying – Action against students, school authorities and Government of Malaysia – Student/claimant assaulted by other students – Claimant sustained injuries on face and body and lost hearing in right ear – Whether school authorities and Government of Malaysia vicariously liable for assault and battery committed by students – Whether assault and battery reasonably foreseeable*

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The appellant, a student of a residential school, was repeatedly assaulted by five other students ('first five defendants') at the school's Bilik Asrama Ketua Pengawas and Penolong Ketua Pengawas. Following the assault, the appellant sustained injuries to his right ear, face and body. He then went to bed that night and woke up to a bleeding ear. The appellant was treated at a local clinic and a follow-up scheduled. It was only during the follow-up, which was two days later, that the assault came to light. The appellant was brought to the hospital, and it was found that he had a perforated right ear. The appellant had since lost hearing in his right ear. The first five defendants were charged at the Magistrate's Court, pursuant to s. 323, read together with s. 34 of the Penal Code ('PC'); they pleaded guilty to the charge. The

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appellant commenced an action, at the High Court, against the first five defendants for the tort of assault and battery and the sixth to ninth defendants, who were responsible for the running and managing of the school, for failing to ensure that he was safe while at the school and for being vicariously liable for the tort committed by the first five defendants. Satisfied that the appellant had proved his claim against the defendants, the High Court awarded special and exemplary damages in the amount of RM4,634.20 and RM120,000, respectively. The defendants appealed against the decision while the appellant appealed against the quantum awarded, at the Court of Appeal. In overturning the decision of the High Court, the Court of Appeal held, *inter alia*, that: (i) the school had rules and regulations and discipline and such acts were not tolerated; (ii) there were no cries for help at the material time and the episode happened during lights out when all students were supposedly asleep and it took place in a room which was least expected; and (iii) the appellant failed to prove duty of care, presumably the existence of such duty. Hence, the present appeals.

Held (allowing appeals)
Per Mary Lim FCJ delivering the judgment of the court:

(1) There was ample evidence to prove that the first five defendants assaulted and battered the appellant. First was the admissions by the first five defendants of guilt to the charge under s. 323, read together with s. 34, of the PC. The existence of the admissions was entirely relevant to the appellant's case that he was assaulted by these defendants, that the assault resulted in these defendants being charged and lastly, that they admitted and pleaded guilty to the charge before the Magistrate's Court. The admissions were introduced as part of the narrative of the appellant's case, and not as proof of the tort of assault and battery without more. What must not be overlooked was that the defendants did not, for a single moment, deny the existence of these admissions not just before the Magistrate's Court but also at several other occasions, namely: (i) the disciplinary proceedings initiated by the school; (ii) at the trial of this civil claim; and (iii) the evidence of the appellant himself. There was also evidence in abundance to corroborate the appellant's claim of assault by these defendants. (paras 26, 27, 30, 31, 32, 34 & 37)

(2) The bullying or physical assault that occurred in the Bilik Ketua Pengawas was indeed reasonably foreseeable. Evidence showed that spot checks were carried out in the premises, including in the Bilik Ketua Pengawas but, on that night, there was an omission to check the said room. Spot checks, by their very nature, are to ensure discipline and compliance with rules and regulations, routinely carried out by those responsible, either knowingly of the likelihood of indiscipline or there

had, in fact, been some previous episode of disobedience or non-compliance of rules or regulations such as the failure to comply with lights out. Whatever the reason for conducting spot checks may be, it was undeniable that the Bilik Ketua Pengawas was not spared. Furthermore, the display of posters against bullying, as provided by the Ministry of Education, around the premises of the school, further supported the view that bullying was well within the reasonable contemplation of the authorities, including the sixth to ninth defendants. Those in charge of the supervision of the school could not thus make any credible argument on lack of foreseeability. The sixth to ninth defendants remained accountable for the acts of bullying and physical assault occasioned by the first five defendants as not enough was done to prevent the abusive acts from happening. (paras 44, 45 & 47)

(3) The failure and omissions on the part of the sixth to eighth defendants rendered the ninth defendant, the Government of Malaysia, to be vicariously liable. These persons were but the means by which the ninth defendant effectuated its duties and responsibilities in relation to education in a residential school. The ninth defendant remained in control of these defendants, including the students, the first five defendants, and was thus responsible and liable for their acts and omissions. (para 48)

(4) The order of the Court of Appeal was set aside. The awards as to the various heads of damages were reinstated in favour of the appellant, as ordered by the High Court. (paras 52 & 54)

Bahasa Melayu *Headnotes*

Perayu, seorang pelajar sebuah sekolah berasrama penuh, telah diserang berulang kali oleh lima pelajar lain ('lima defendan pertama') di Bilik Asrama Ketua Pengawas dan Penolong Ketua Pengawas di sekolah tersebut. Berikutan serangan itu, perayu mengalami kecederaan pada telinga kanan, muka dan badannya. Dia kemudian tidur pada malam kejadian dan bangun dengan telinga berdarah. Perayu dirawat di klinik setempat dan satu pemeriksaan susulan dijadualkan. Ketika pemeriksaan susulan, iaitu dua hari kemudian, barulah terdedahnya kejadian serangan. Perayu dibawa ke hospital dan telinga kanannya didapati pecah. Perayu kini hilang pendengaran telinga kanannya. Lima defendan pertama dituduh di Mahkamah Majistret, bawah s. 323 dibaca bersama-sama s. 34 Kanun Keseksaan ('KK'); mereka mengaku bersalah terhadap pertuduhan. Perayu memulakan satu tindakan, di Mahkamah Tinggi, terhadap lima defendan pertama atas tort serangan dan mendatangkan kecederaan dan defendan keenam hingga kesembilan, yang bertanggungjawab mentadbir dan

menguruskan sekolah tersebut, atas kegagalan memastikan perayu selamat ketika berada di sekolah dan kerana bertanggungan secara vikarius atas tort yang dilakukan oleh lima defendan pertama. Berpuas hati perayu telah membuktikan tuntutannya terhadap defendan-defendan, Mahkamah Tinggi mengawardkan ganti rugi khas dan teladan yang masing-masing berjumlah RM4,634.20 dan RM120,000. Defendan-defendan merayu terhadap keputusan tersebut manakala perayu merayu terhadap kuantum yang diawardkan, di Mahkamah Rayuan. Mengakas keputusan Mahkamah Tinggi, Mahkamah Rayuan memutuskan, antara lain, bahawa: (i) sekolah mempunyai undang-undang dan peraturan dan tindakan-tindakan tersebut tidak boleh diterima; (ii) tiada teriakan minta tolong semasa kejadian berlaku dan peristiwa tersebut berlaku ketika lampu sudah dipadamkan apabila semua pelajar sepatutnya tidur dan berlaku di dalam bilik yang paling tidak dijangka; dan (iii) perayu gagal membuktikan tanggungjawab berhati-hati, beranggapkan wujudnya tanggungjawab sedemikian. Maka timbul rayuan-rayuan ini.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

(1) Terdapat lambakan keterangan yang membuktikan bahawa lima defendan pertama menyerang dan memukul perayu. Pertama adalah pengakuan salah oleh lima defendan pertama terhadap pertuduhan bawah s. 323 dibaca bersama-sama s. 34 KK. Kewujudan pengakuan ini relevan sepenuhnya dengan kes perayu bahawa dia diserang oleh defendan-defendan ini, bahawa serangan menyebabkan defendan-defendan ini dituduh dan akhir sekali, mereka mengaku dan mengaku bersalah atas pertuduhan di Mahkamah Majistret. Pengakuan-pengakuan ini dimuatkan sebagai sebahagian naratif kes perayu dan bukan sebagai pembuktian tort serangan dan mendatangkan kecederaan, tanpa lebih. Tidak boleh dilepas pandang bahawa defendan-defendan tidak sekalipun menafikan kewujudan pengakuan-pengakuan ini, bukan sahaja di Mahkamah Majistret bahkan dalam beberapa peristiwa lain, khususnya: (i) prosiding disiplin yang dijalankan oleh sekolah; (ii) semasa perbicaraan tuntutan sivil; dan (iii) keterangan perayu sendiri. Terdapat juga keterangan yang melimpah ruah untuk menyokong tuntutan perayu bersangkutan serangan oleh defendan-defendan ini.

(2) Buli atau serangan fizikal yang berlaku di Bilik Ketua Pengawas sememangnya boleh dijangka secara munasabah. Keterangan menunjukkan bahawa pemeriksaan mengejut dijalankan di premis, termasuk Bilik Ketua Pengawas tetapi, pada malam kejadian, terdapat ketinggalan memeriksa bilik tersebut. Pemeriksaan mengejut, berdasarkan sifatnya, berfungsi memastikan disiplin dan pematuhan pada undang-undang dan peraturan, dijalankan oleh pihak yang

bertanggungjawab, sama ada dengan disedarinya akan kemungkinan tidak berdisiplin atau sememangnya berlaku episod keingkaran atau ketakpatuhan undang-undang atau peraturan seperti kegagalan mematuhi pemadaman lampu. Apa-apa jua alasan untuk menjalankan pemeriksaan mengejut, tidak dinafikan bahawa Bilik Ketua Pengawas tidak terkecuali. Selanjutnya, pameran poster-poster anti-buli, seperti yang diperuntukkan oleh Kementerian Pendidikan, seterusnya memperkukuhkan lagi pandangan bahawa buli terangkum dalam jangkaan munasabah pihak berkuasa, termasuk defendan keenam hingga kesembilan. Pihak-pihak yang terlibat dalam penyeliaan sekolah tidak boleh mengemukakan hujahan yang boleh dipercayai tentang ketiadaan kebolehjangkaan. Defendan keenam hingga kesembilan kekal bertanggungjawab bagi tindakan buli dan serangan fizikal yang dilakukan oleh lima defendan pertama kerana tidak cukup langkah yang diambil untuk mengelakkan tindakan-tindakan penderaan daripada berlaku.

(3) Kegagalan dan ketinggalan oleh defendan keenam hingga kelapan menjadikan defendan kesembilan, iaitu Kerajaan Malaysia, bertanggungan secara vikarius. Mereka ini adalah saluran untuk defendan kesembilan memberi kesan pada kewajipan dan tanggungjawabnya berkaitan pendidikan di sekolah berasrama. Defendan kesembilan kekal mempunyai kawalan atas defendan-defendan ini, termasuk pelajar-pelajar iaitu lima defendan pertama dan, ekoran itu, bertanggungjawab dan bertanggungan atas tindakan-tindakan dan ketinggalan-ketinggalan mereka.

(4) Perintah Mahkamah Rayuan diketepikan. Award berkenaan pelbagai tajuk ganti rugi yang memihak pada perayu, seperti yang diperintahkan oleh Mahkamah Tinggi, dikembalikan.

Case(s) referred to:

Government of Malaysia & Ors v. Jumat Mamud & Anor [1977] CLJU 29; [1977] 1 LNS 29 FC ***(refd)***

Home Office v. Dorset Yacht Co Ltd [1970] 2 All ER 294 ***(refd)***

Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors [1982] CLJ 150; [1982] CLJ (Rep) 232 FC ***(refd)***

Nurul Atikah Mustafa Kamal v. Nurazlina Suriani Zulkifly & Ors [2019] 9 CLJ 395 HC ***(refd)***

Overseas Tankship (UK) Ltd v. Morts Dock And Engineering Co Ltd, The Wagon Mound [1961] 1 All ER 404 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 173A

Evidence Act 1950, ss. 21, 31, 43

Penal Code, ss. 34, 323

For the appellant - Hisyam Yusof, Wan Azliana Wan Adnan, Nik Nur Syazwani Nik Suhaimi & Diyana Ibrahim; M/s Wan Adnan & Partners
For the 1st respondent - Azrulrizal Ibrahim; M/s Azman, Wan Helmi & Assocs
For the 2nd to 5th respondents - Nik Mohd Radhia Nik Abdul Ghani, Wan Ahmad Faiz Wan Abdullah, Wan Solehah Wan Mohamad & Mat Zaidan Ali; M/s WM Haidi & Assocs
For the 6th to 9th respondents - Andi Razalijaya A Dadi & Zureen Elina Mohd Dom; SFCs & Safiyyah Omar, Mohd Khairulhazman Ghazali & Ahmad Hafizuddin Manjur Ahmad; FCs

[Editor's note: For the Court of Appeal judgment, please see Sulaiman Ngarif & Yang Lain lwn. Ahmad Ikhwan Ahmad Fauzi & Satu Lagi Dan Satu Lagi Rayuan [2022] 5 CLJ 375 (overruled); For the High Court judgment, please see Ahmad Ikhwan Ahmad Fauzi lwn. Ahmad Safwan Hanim Mohd Fahimi & Yang Lain [2020] 9 CLJ 379 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Mary Lim FCJ:

[1] These appeals concern a most unfortunate event of assault in a residential school, what is frequently referred to as 'school bullying'. Schools of any arrangement are for learning, where a person is educated in the many disciplines and subjects, preparing them for responsibilities, choices and positions in life. These are important formative years where personalities are formed and traits enhanced. It is therefore only reasonable and fair to expect that these places of learning, even if residential facilities are provided, are safe and conducive. In the case of residential schools, the responsibility would obviously be even wider and more extensive.

[2] In these appeals, the appellant, a student of a residential school sued not just the students who assaulted him but also those who were charged with the responsibility of running and managing the residential school. The claim was allowed by the High Court but on appeal, the decision was reversed. After a full hearing, we unanimously allowed the appeal and restored the decision of the High Court but declined to make any award for aggravated or exemplary damages. These grounds contain our reasons for that decision.

The Assault

[3] Sekolah Menengah Sains Sultan Mahmud (SESMA) Kuala Terengganu is a residential school. I understand it is one of the most coveted residential schools in the country, offering secondary education. The appellant together with the first five defendants cited at the High Court, were students at that school.

[4] Between the hours of 10.40pm of 26 April 2015 and 2am of the following day, the appellant claimed that he was taken to the Bilik Asrama Ketua Pengawas and Penolong Ketua Pengawas located within the school, where he was repeatedly assaulted by the first five defendants. Both the ketua pengawas and the penolong ketua pengawas who were in the room, watched. Although they did not take part in the assault, they did nothing to stop it.

[5] The appellant sustained injuries to his right ear, face and body. Despite his injuries, the appellant did not complain about the incident to anyone. Instead, he went to bed and when he awoke in the morning, found himself bleeding from his right ear. He informed the warden of the bleeding but not the reason; according to him, for fear of reprisal. He was treated at a local clinic with a follow-up scheduled for 29 April 2015.

[6] It was only at the follow-up on 29 April 2015 that he told of the reasons for the bleeding and of his other injuries. His father was called in and he was then brought to the hospital by his father. There, it was found that he had a perforated right ear. The appellant has since lost hearing in his right ear.

[7] A police report was lodged on 30 April 2015.

[8] On 27 April 2016, the first five defendants were charged at the Magistrate's Court for an offence under s. 323 of the Penal Code read with s. 34 of the same Code. On 1 June 2016, the first five defendants pleaded guilty to the charge and were given a good behaviour bond for two years with a monetary surety of RM1,000 under s. 173A of the Criminal Procedure Code where a conviction for the offence charged would not be recorded. There was no appeal, be it by these five defendants or by the prosecution.

[9] Meanwhile, the appellant transferred to another school, upon his own request as he became somewhat fearful following the assault and battery and was unable to focus on his studies. This was after the representatives from the school called on the appellant and his family at home, offering to settle the incident with a payment of RM1,000. The offer was rejected.

[10] The school took disciplinary action against the first five defendants. The first four defendants were suspended from school for two weeks whilst the fifth defendant was expelled. He, however appealed and was allowed to be transferred to another school.

[11] The appellant sued the first five defendants for the tort of assault and battery and the sixth to the ninth defendants for principally failing to ensure that he was safe whilst at the residential school. The appellant claimed that the sixth to the ninth defendants were also vicariously liable for the tort of the first five defendants.

[12] For the purpose of these appeals, we will refer to the respondents before us in their capacities at the High Court, namely as the first five defendants in relation to the students who are alleged to have physically assaulted the appellant; the sixth and seventh defendants being the persons in charge of the school; the eighth and ninth defendants, the Ministry and the Government, entities ultimately responsible for the other defendants.

At The High Court

[13] At the trial, the appellant testified how he was assaulted by each of these five defendants. The first defendant punched, beat, hit his face with a rugby ball and ordered him to do squats; and if he fell whilst doing the squats, he would be further beaten. The second defendant punched and hit him in the body aside from pushing his head against a locker door. The third defendant punched, hit and used his knees to hit him in his stomach as well as hit his head against the third defendant's knees and elbows. The fourth and fifth defendants punched, beat and hit him in his stomach and his body.

[14] The learned judge was satisfied that the claim was proved against these defendants. As for the other defendants, the learned judge found that since the incident happened well within the premises of the school, that because the Bilik Ketua Pengawas and the Bilik Penolong Ketua Pengawas were part of the administration of the school, the sixth and seventh defendants as the penolong kanan hal ehwal murid and the pengetua were thus liable for the acts of the first five defendants.

[15] At para. 20 of his reasons, the learned judge accepted the pleas of guilt of the first five defendants made before the Magistrate's Court. Since there was no appeal, such pleas were taken as final and binding (muktamad dan mengikat). According to His Lordship, this meant that these defendants were liable for their acts. Specifically, the High Court found that had the warden on duty inspected the dormitories including bilik asrama ketua pengawas and penolong ketua pengawas on that fateful night as it was his duty to do so, it would have made a difference in that the incident may not have occurred.

[16] Citing amongst others, *Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors* [1982] CLJ 150; [1982] CLJ (Rep) 232; [1980] 1 MLRA 10; [1981] 2 MLJ 27 and *Nurul Atikah Mustafa Kamal v. Nurazlina Suriani Zulkifly & Ors* [2019] 9 CLJ 395; [2019] MLRH 393, the High Court found the sixth to ninth defendants liable. Aside from awarding general damages for the injuries sustained and special damages of RM4,634.20 together with interest and costs, the learned judge awarded a sum of RM120,000 as exemplary damages but made no award for aggravated damages.

At The Court Of Appeal

[17] All the defendants appealed. Likewise, the appellant who was dissatisfied with the quantum awarded.

[18] The Court of Appeal identified eight principal issues to be determined. Amongst those issues were:

(i) whether the High Court was entitled to accept the first five defendants' pleas of guilt before the Magistrate's Court;

(ii) whether the ketua pengawas and/or penolong ketua pengawas were representatives of the administration of the school;

(iii) whether the sixth and seventh defendants were vicariously liable for the acts of the first five defendants; and

(iv) whether the eighth and ninth defendants were vicariously liable for the acts of sixth and seventh defendants.

[19] Insofar as the issue of the pleas of guilt was concerned, the Court of Appeal held that whilst the High Court was entitled to rely on the pleas of guilt under s. 21 of the Evidence Act 1950, the High Court fell into error in relying entirely on such pleas when concluding that the tort had been proved. As cautioned by s. 31 of the Evidence Act 1950, "admissions are not conclusive proof of the matter admitted".

[20] According to the Court of Appeal, putting aside the matter of the pleas for a moment, there was actually insufficient evidence to prove the assault; concluding that the evidence led was inconclusive and inconsistent. In the words of the Court of Appeal, if indeed the appellant was repeatedly punched, beaten and hit, there would have been bruises or injuries on the appellant's body. Yet, none were found. Since the ketua pengawas and the penolong ketua pengawas, who were said to have stood watching the alleged assault, were not called by the appellant, an adverse inference ought to have been drawn against the appellant.

[21] As for the questions of whether the sixth and seventh defendants were representatives of the administration and vicariously liable for the acts of the first five defendants, and the eighth and ninth defendants in turn vicariously liable for these defendants, the Court of Appeal concluded that the High Court was in error in failing to have regard to the fact that the assault and battery was not reasonably foreseeable since it happened in the Bilik Ketua Pengawas, during "lights out" and when all the students were supposed to be asleep.

[22] The Court of Appeal was of the view that the Bilik Ketua Pengawas was the last place for such an incident to take place ("pada hemat kami, antara tempat terakhir di sebuah sekolah yang akan dijangka berlakunya perbuatan/kegiatan salah adalah di dalam bilik pengawas"). The Court of Appeal added "Seorang pengawas adalah sinonim dengan individu berkelakuan baik, berdisiplin dan bertanggungjawab." Following *Government*

Of Malaysia & Ors v. Jumat Mahmud & Anor [1977] CLJU 29; [1977] 1 LNS 29; [1977] 2 MLJ 103, [1977] 1 MLRA, it was neither reasonable nor logical for these defendants to foresee the occurrence of an assault. These defendants thus did not owe the appellant a duty of care.

[23] For completeness, the Court of Appeal dealt with the issue of quantum. It set aside the award for costs of hearing aid of RM252,000 for want of proof but in the next breath, proceeded to award a reduced sum of RM84,000 on account of 1/3 contingency. The Court of Appeal also set aside the awards of general damages (save for a sum of RM5,000) and exemplary damages. It refused to make any award for aggravated damages.

[24] The appellant obtained leave to appeal, posing questions on both liability and on quantum in the two appeals before us.

Our Decision

[25] It goes without saying that schools, residential or otherwise must be safe and conducive for the purpose(s) intended. Otherwise, the providers and consumers of such institutions would face considerable difficulties in enrolment, whether of student or teaching faculty.

Proof Of Assault And Battery

[26] Dealing first with the matter of the assault. Having considered the submissions of all learned counsel on behalf of the respective parties, and having combed the records of appeal, in particular the grounds of decisions of both the High Court and the Court of Appeal, contrary to the Court of Appeal's findings, there is ample evidence to prove the first to the fifth defendants assaulted and battered the appellant.

[27] First, the admissions of guilt to the charge under s. 323 of the Penal Code read with s. 34 of the same Code by these defendants. These admissions, which were unconditional and voluntarily made, are admissible and relevant to the allegation that an assault involving the appellant and these defendants did indeed take place. The admissions were not introduced for the purpose of proving the fact of convictions of the charge under s. 323 (for which there were none in view of s. 173A of the CPC) in which case s. 43 of the Evidence Act 1950 would apply, but for the fact that such admissions existed.

[28] Similarly, the decision of the Magistrate in relation to the pleas made is also relevant to the whole narrative of the appellant's claim. While there may not be a conviction recorded, for the purpose of the present civil proceedings, the decision remains relevant but does not in itself prove the tort alleged. As provided in s. 21 of the Evidence Act 1950, such admissions are relevant and may be proved against these defendants:

Proof of admissions against persons making them and by or on their behalf

21. **Admissions are relevant and may be proved as against the person who makes them or his representative in interest**; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:

(a) an admission may be proved by or on behalf of the person making it when it is of a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32;

(b) an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when that state of mind or body existed and is accompanied by conduct rendering its falsehood improbable;

(c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

(emphasis added)

[29] Although s. 31 of the Evidence Act 1950 cautions that such admissions are not conclusive proof, such evidence remains relevant until proved otherwise:

Admissions not conclusive proof but may estop

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

[30] The existence of the admissions is entirely relevant to the appellant's case that he was assaulted by these defendants, that the assault resulted in the defendants being charged and lastly, that they admitted and pleaded guilty to the charge before the Magistrate's Court. The admissions were introduced as part of the narrative of the appellant's case, and not as proof of the tort of assault and battery without more. What must not be overlooked is that these defendants did not for a single moment, deny the existence of these admissions made not just before the Magistrate's Court but also at several other occasions. That aspect appears to have escaped the attention of the Court of Appeal.

[31] There were at least three such instances of admission. The first was almost immediately after the unfortunate episode when disciplinary proceedings over "kes pukul pelajar tingkatan dua" were initiated by the school against these defendants without exception. The disciplinary proceedings culminated in their suspension and in the case of the fifth defendant, his expulsion. Their admissions may be found in their written responses to the show cause issued by the school – see exhs. 51, 62 to 65.

[32] At the trial of this civil claim, these defendants testified that they had written to the school admitting to "membuli, memukul dan/atau menyerang plaintif pada malam kejadian tersebut". These admissions were corroborated

by the testimonies of their teachers, SD9 (Amir bin Ya) and SD12 (Azhari bin A Rahman). It was as a result of their respective admissions that punishment as aforesaid were meted out against each of them. This stern action on the part of the school authorities cannot be overlooked and in fact corroborate the appellant's claim of assault.

[33] Next were the admissions at the trial of the present civil action. Each of these five defendants admitted to their culpability when asked direct questions as to whether they had assaulted the appellant. Each of these defendants admitted to "memukul, menampar bahagian pipi plaintif berkali-kali dan/atau menyuruh plaintif duduk dalam keadaan squat". See p. 882 onwards of the records of appeal. In re-examination by his counsel, the fourth defendant even admitted that he "tampar dulu baru squat" the appellant.

[34] Then, there was the evidence of the appellant himself for which there was no reason to doubt, whether by the High Court or the Court of Appeal. This was a classic case where the High Court had the video-audio advantage and the Court of Appeal should have been slow to interfere in the findings of fact of the High Court.

[35] The doctors who attended to the appellant soon after the assault also testified on the injuries sustained by the appellant – see evidence of SP9 (Dr Azrahayu binti Azmi), SP2 (Dr Ehsan Syukri bin Zainun) and SP5 (Dr Fairuz binti Mohd Ibrahim). These witnesses opined that the injuries found were consistent with "kesan trauma diakibatkan benda-benda tumpul, sebagai contohnya hentakan pada kepala ataupun ditampar kuat pada bahagian telinga".

[36] All these pieces of evidence were evaluated by the trial judge and His Lordship was satisfied on a balance of probabilities that the appellant's case was proved – see paras. 17 to 19 of the grounds of decision. Contrary to the Court of Appeal's findings, the learned judge's findings were correct on the facts and in law.

[37] The Court of Appeal was therefore in error when it found that the liability against the respondents was based only entirely on the pleas of guilt in the Magistrate's Court by the first five defendants. The learned judge was entitled to rely on the pleas of guilt by these five defendants. More than that, it is clearly evident that there was evidence in abundance to corroborate the appellant's claim of assault by these defendants, should such a need even arise.

Test Of Reasonable Foreseeability

[38] Moving next to the second question of law which is on the standard test of reasonable foreseeability. The law in this respect is trite. The principles on foreseeability as propounded in *Overseas Tankship (UK) Ltd v. Morts Dock And Engineering Co Ltd, The Wagon Mound* [1961] 1 All ER 404; [1961] AC 388; [1961] 2 WLR 126 and applied in *Home Office v. Dorset*

A *Yacht Co Ltd* [1970] 2 All ER 294; [1970] AC 1004; [1970] 2 WLR 1140 have found roots in our jurisprudence. We see no call to revisit any of these principles. The challenge, as always, is in the application of principles to particular facts.

B **[39]** Here, the Court of Appeal disagreed with the High Court in holding that bullying or assault was reasonably foreseeable. The Court of Appeal held that the High Court failed to have regard to the fact that the school had rules and regulations on discipline and that such acts were not tolerated. Further, there were no cries for help at the material time, that the episode happened during lights out when all students were supposedly asleep, and it took place C in a room which was least expected. The Court of Appeal concluded that the appellant had in fact failed to prove duty of care, presumably the existence of such duty.

[40] With respect, that is conflating reasonable foreseeability with actual and subjective foreseeability, the existence of a duty of care with breach of D the duty of care.

[41] It cannot be denied that the sixth to the ninth defendants do owe a duty of care to all students enrolled in the school, collectively and individually. That includes a duty owed to the appellant. Whilst within their premises and the compound of the premises of the school, these defendants are responsible E for their safety, welfare and well-being, that these students are safe from harm, whether caused by conditions of the premises themselves or by others occupying or licenced to be within the premises.

[42] We have already expressed views to this effect in *Government Of* F *Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*) and *Mohd Raihan Ibrahim & Anor v. Government Of Malaysia & Ors* (*supra*); that by reason of the special relationship between teachers and similar personnel and the student, the teachers owe a duty to the student to take reasonable care for the safety of the student. School teachers and other similar personnel are under a duty to G supervise the students when the students are within the school, for the ultimate purpose of maintaining discipline, safety and well-being of the students. The degree of supervision depends on the circumstances of each case – see *Mohd Raihan Ibrahim* (*supra*).

[43] In these appeals, the bullying took place at the Bilik Ketua Pengawas, H a room so designated by these defendants. Although it may have been the last place that one would expect that assault and battery as complained of would occur, it is beyond the pale that the appellant was physically assaulted in that room between the hours and on the day identified.

[44] From the facts and circumstances, the bullying or physical assault that I unfortunately occurred in the Bilik Ketua Pengawas on that fateful night was indeed reasonably foreseeable. The evidence of Cikgu Rahmat (SD13) amongst others pointed to the fact that spot checks were carried out in the

premises, including in the Bilik Ketua Pengawas, but on that night, SD13 omitted checking that room during his rounds. Spot checks by their very nature are to ensure discipline and compliance with rules and regulations; routinely carried out by those responsible either knowingly of the likelihood of indiscipline or there had in fact being some previous episode of disobedience or non-compliance of rules or regulations such as the failure to comply with lights out. Whatever may be the reason for conducting spot checks, it is undeniable that the Bilik Ketua Pengawas was not spared in those spot checks.

[45] The display of posters against bullying, as provided by the Ministry of Education around the premises of the residential school further support the view that bullying was well within the reasonable contemplation of the authorities, including the sixth to the ninth defendants. Those in charge of the supervision of the residential school cannot thus make any credible argument on lack of foreseeability.

[46] "Bullying" by whatever name or label and however carried out and by whosoever, unfortunately continues to occur in what is supposed to be our safe havens of education. There is no distinction between residential or any type of school. The dissemination and display of such posters may even be said to be part of the efforts taken by the authorities to ensure the safety of the students. Yet, the discipline of students of all ages remains a necessary part of any education curriculum. Basic values of mutual respect for one another must be inculcated in all our young and it should not be left to expensive and unfortunate incidents such as revealed in these appeals to remind us of these values.

[47] Since it was reasonably foreseeable that bullying would occur within the premises of the residential school, and the appellant was indeed bullied in that he was assaulted by his fellow students, it is no longer an issue of non-foreseeability. The sixth to the ninth defendants remain accountable for the acts of bullying and physical assault occasioned by the first five defendants as it would appear, not enough was done to prevent the abusive acts from happening.

Vicarious Liability

[48] On this issue, it is clear that the failure and omissions on the part of the sixth to eighth defendants render the ninth defendant, the Government of Malaysia to be vicariously liable. These persons are but the means by which the ninth defendant effectuates its duties and responsibilities in relation to education in a residential school. The ninth defendant remains in control of these defendants including the students, the first five defendants, and is thus responsible and liable for their acts and omissions.

[49] Since the damage (the bullying) to the appellant is reasonably foreseeable, these defendants indeed owe the appellant a duty of care to keep him safe from harm, including any form of bullying by any persons within the control of these defendants. The first five defendants are not strangers in the school and these defendants are responsible for their acts and/or omissions. The fact that the school is a residential school makes not a shred of difference to the issue of accountability and liability in law.

[50] The further fact that the bullying or physical assault on the appellant took place in the prefects' room (Bilik Ketua Pengawas and Penolong Ketua Pengawas) does not make any difference. Such space or persons are not sacrosanct immune and incapable from unlawful acts, as displayed by the facts. The presence of the two prefects at the material time, even if not called, is not in dispute. Their standing idle by not preventing or saving the appellant from being bullied for any length of time is evidence of negligence to which these defendants remain vicariously and personally liable.

[51] In the upshot, therefore all the defendants at the High Court and now the respondents before us, are liable.

Damages

[52] As for damages, we reinstated the awards as to the various head of damages in favour of the appellant as ordered by the High Court Judge. There was no conceivable reason for the Court of Appeal to disturb the award of the High Court on the matter of hearing aids. The need for such aids was certainly there and there was again, plenty of evidence to support the appellant's claim for replacement of these aids over the course of time to come. The Court of Appeal was further inconsistent to on the one hand, set aside the award for such replacement costs and in the very next moment, make some award, though reduced.

[53] In respect of the award for aggravated damages and exemplary damages, we decline to award any aggravated damages or to increase the award on exemplary damages.

Conclusion

[54] The order of the Court of Appeal is therefore hereby set aside and the High Court orders on compensation are reinstated. We order costs of RM150,000 here and below subject to payment of allocatur fee.